

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**



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Order Instituting Rulemaking to Implement the
Commission's Procurement Incentive Framework and to
Examine the Integration of Greenhouse Gas Emissions
Standards into Procurement Policies.

Rulemaking 06-04-009
(Filed April 13, 2006)

**RESPONSE OF SAN DIEGO GAS & ELECTRIC COMPANY
(U 902 E) AND SOUTHERN CALIFORNIA GAS COMPANY
(U 904 G) ON ADMINISTRATIVE LAW JUDGE'S RULING
REQUESTING COMMENTS AND LEGAL BRIEFS ON
MARKET ADVISORY COMMITTEE REPORT**

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**I.
INTRODUCTION AND BACKGROUND**

In accordance with the Rules of Practice and Procedure of the California Public Utilities Commission (the "Commission") and the Administrative Law Judges' Ruling Requesting Comments on Market Advisory Committee's Report and Notice of En Banc Hearing (the "ALJ Ruling"), dated July 19, 2007, San Diego Gas & Electric Company ("SDG&E") and Southern California Gas Company ("SoCalGas") hereby submit the following responses to the questions posed by the ALJ Ruling.

On April 13, 2006, the Commission adopted its *Order Instituting Rulemaking to Implement the Commission's Procurement Incentive Framework and to Examine the Integration of Greenhouse Gas Emissions Standards into Procurement Policies* (the "OIR"). The OIR indicated that the rulemaking would be split into two phases. In Phase I of the rulemaking, the Commission considered threshold issues related to adoption of a Greenhouse Gas ("GHG") emissions performance standard ("EPS"). Phase II will focus on development of joint recommendations regarding regulatory treatment of

GHG emissions in the electricity and natural gas sectors to be presented by the Commission and the California Energy Commission (“CEC”) to the California Air Resources Board (“CARB”), in accordance with Assembly Bill (“AB”) 32.^{1/} Because Phase II focuses upon development of guidelines to be submitted for CARB’s consideration, the OIR further provides for consideration of the approach proposed by the Market Advisory Committee (“MAC”) for the electric sector.^{2/}

In furtherance of AB 32, Governor Arnold Schwarzenegger directed the Secretary for Environmental Protection, Linda Adams, to create MAC to advise CARB regarding the development of a GHG reduction plan for California. The Committee is composed of national and international experts who have backgrounds in economics, environmental policy, regulatory affairs, and energy technologies. On June 30, 2007, MAC issued its *Recommendations for Designing a Greenhouse Gas Cap-and-Trade System for California* (“MAC Report”), which was intended to complement and build upon California’s ongoing efforts to reduce emissions and its historic leadership in environmental protection.^{3/}

The ALJ Ruling sets forth questions to be addressed which focus on legal, regulatory, market and operational issues associated with the “first-seller” approach for an electric sector cap-and-trade system, as identified in the MAC Report.^{4/} The ALJ Ruling invites parties to offer comments and legal briefs regarding the MAC Report recommendations.^{5/} SDG&E and SoCalGas support implementing AB 32 in the most efficient and effective manner that allows the State to achieve its desired GHG reduction

^{1/} ALJ Ruling, p. 2.

^{2/} *Id.*

^{3/} The MAC Report is available at http://climatechange.ca.gov/documents/2007-06-29_MAC_FINAL_REPORT.PDF.

^{4/} *Id.* at pp.4-12.

targets, while minimizing cost to the customer. To best achieve these objectives the point of regulation for AB 32 must balance legal, regulatory, market, and operational issues.

A properly structured and functioning (broad, liquid and transparent) cap-and-trade market that includes the electric sector must be capable of minimizing costs to customers of complying with AB 32. It should allow for a range of cost-effective compliance options, ensure that no single sector assumes a disproportionate burden, and establish linkages to other domestic and international programs. Some important characteristics include providing for a degree of certainty to facilitate necessary investments; allowing for the lead time for necessary capital investment and replacements; transparency, supported by accurate and reliable information; fairness to customers of each load serving entity, recognizing investments made in reducing greenhouse gas emissions since 1990 (early action), and the future costs of achieving reductions; providing appropriate incentives for technology advancement; and managing market impacts, including unanticipated events. At a high level, it appears that for the electric sector, either a load-based or a first-seller approach could achieve the above stated goals.^{5/} Conversely, either a load-based or a first-seller point of regulation may also be implemented in a manner that none of the necessary criteria is achieved. But as a first step, the significant and complex legal issues that that must be effectively addressed under any state regulatory approach to address GHG emissions, especially where the state may face claims of broad FERC preemption or Commerce Clause violations. Failure to craft effective solutions to these barriers will only delay, and perhaps seriously compromise the desired GHG reduction targets.

^{5/} *Id.* at p. 1.

^{6/} “First-seller” is herein used as in the Administrative Law Judges’ Ruling Requesting Comments and Legal Briefs on Market Advisory Committee Report and Notice of En Banc Hearing at page 4. It is where

II. GENERAL RESPONSE

Chapter 5 in the MAC Report discusses the unique characteristics of the electric sector and the requirements in AB 32 that require consideration of imported electricity. The MAC considered both the load-based and first-seller approaches and recommended the first-seller approach. The ALJ Ruling desires to go the next step and provide a more detailed analysis of the first seller approach.

SDG&E and SoCalGas believe the legal questions surrounding the first-seller approach are threshold questions to warrant consideration before adopting a framework that was rejected by the Regional Greenhouse Gas Initiative (“RGGI”) on legal grounds.^{7/} The MAC report itself raises legal questions surrounding the first-seller approach.^{8/} SDG&E and SoCalGas’ address these legal questions and responds specifically to questions 43-53 of the ALJ Ruling which are conveniently transcribed below.

SDG&E and SoCalGas, however, have not attempted to answer the first 43 detailed questions posed in the ALJ Ruling since at this time they have not yet fully evaluated the first-seller approach. Nevertheless, SDG&E and SoCalGas offer the following observations based on expert presentations made in prior CPUC workshops and symposiums discussing these issues as well as the MAC discussion.

- A first-seller approach appears to allow for more accurate accounting and attribution of GHG emissions if GHG emission tracking mechanisms are not vastly improved. Imports would be of the same quality under both the

the deliverer of energy is both the point of regulation and the entity required to report its emissions.

^{7/} Potential Emissions Leakage and the Regional Greenhouse Gas Initiative (RGGI): Evaluating Market Dynamics, Monitoring Options, and Possible Mitigation Mechanisms, Initial Report of the RGGI Emissions Leakage Multi-State Staff Working Group to the RGGI Agency Heads, March 14, 2007, footnote 58, page 39.

^{8/} MAC report, page 45.

first seller and load-based approaches, but market purchases from California sources would be more accurately tracked at the point of reporting with current tracking systems.

- A first-seller approach appears to explicitly internalize GHG compliance costs in electric prices and would impact dispatch of electric supply resources. Instead of implicitly incorporating GHG compliance costs in LSE purchase decisions (and potentially having the CAISO alter its dispatch rules to implicitly incorporate GHG attributes), the AB 32 compliance costs are explicit in energy prices.
- A first-seller approach appears to provide for a smoother transition to any of the currently proposed federal proposals which are largely source based in their regulatory structure.

III. RESPONSES TO LEGAL QUESTIONS

Federal Power Act

43. Would the Federal Power Act preempt adoption of the deliverer/first-seller approach? Why or why not? Does it make any difference that the federal government has not issued any regulations in this specific area?

The Federal Power Act (“FPA”) gave Federal Energy Regulatory Commission (“FERC”) the authority to preempt state authorities to the extent state regulation interferes with FERC’s authority over rates, terms and conditions of wholesale transactions, thus creating the potential for federal/state disputes if the first-seller approach were structured in a way that imposes California GHG regulations on buyers or sellers operating in a FERC regulated wholesale market.

Under the Supremacy Clause, federal law may supersede state law in a particular

area. To determining whether preemption exists, courts start with the assumption that the historic police powers of the states are not to be superseded by federal act unless that is the clear and manifest purpose of Congress (*Rice v. Santa Fe Elevator Corp.*, 67 S. Ct. 1146 (1947)). The focus is to ascertain Congress' intent (*Allis-Chalmers Corp. v. Lueck*, 105 S. Ct. 1904 (1985)).

Preemption may be either expressed or implied. It is expressed when it is explicitly stated in the federal statute's language. It is implied when it is contained in the law's structure and purpose (*Cade v. National Solid Wastes Management Ass'n*, 112 S. Ct. 2374, 2383 (1992)). Implied preemption falls into two categories: (1) field preemption where Congress indicates an intent to occupy an entire field of regulation; and (2) conflict preemption, where compliance with both state and federal law is impossible or where state law stands as an obstacle to the accomplishment and execution of Congress' full purpose and objectives (*Michigan Canners and Freezers Ass'n. v. Agricultural Marketing and Bargaining Board*, 104 S. Ct. 2518, 2523 (1984)); (*Hines v. Davidowitz*, 61 S. Ct. 399 (1941)).

When Congress has considered preemption and has included in the legislation a provision explicitly addressing it, and when the provision provides a reliable indication of Congressional intent, courts do not have to attempt to infer intent (*Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992)). Courts resort to principles of implied preemption only when Congress has not explicitly expressed its intent (*Cipollone*, at 2625, (Blackman, J. concurring in part and dissenting in part)). Thus, when Congress explicitly states the scope of its preemptive reach, the only question is whether the state act falls within the federal sphere (*Cable Television Ass'n. v. Finneran*, 954 F. 2d 91, 98 (2d Civ. 1992)).

A. Is the “First Seller” Approach Pre-empted Under FERC’s Jurisdictional Authority?

Under either a load-based or a first-seller approach, close attention should be paid to how transactions are characterized to avoid federal preemption. There are many ways that California can design a cap-and-trade system; and while the first-seller approach proposed in the MAC Report generally tends to minimize jurisdictional complications over local distribution, its application to first sellers rather than first in-state purchasers in the electricity sector raises preemption concerns.

In the United States, the wholesale electricity market and the interstate transmission of electricity have been subject to exclusive federal jurisdiction, while the retail sale and local distribution of electricity have been subject to the jurisdiction of the separate states. Until recently, the jurisdictional dividing line has been relatively clear. Indeed, Congress intended to establish a bright line between state and federal jurisdiction. This bright line, however, is becoming blurred by proposals to allow retail customers direct access to competitive generation markets. Regulation of transactions relating to the transmission and sale of electricity at wholesale are both within the exclusive jurisdiction of the federal government. Thus, historically, transmission has coincided precisely with wholesale transactions, while local distribution has coincided precisely with retail transactions.

Since 1978, Congress and the FERC have promulgated statutes and regulations to enhance the competitiveness of the wholesale generation market. As a consequence, there is today many more in-state and out-of-state non-utility entities competing as sellers of wholesale electricity. Hence, now the push is on at the state level to take account of emissions associated with the generation of electricity sold and transmitted across state lines. As scientific knowledge emerges regarding the potential link between increased

concentrations of GHGs such as carbon dioxide and rising global temperatures, policy-makers around the world are increasingly concerned with regulating human activities that produce GHGs. Introduction of alternatives for covering emissions from the electricity sector has the potential to upset, if not extinguish, the traditional bright line between federal and state jurisdiction.

The FPA gave the federal government responsibility for regulation of the transmission of electricity in interstate commerce and the sale of electricity at wholesale.^{9/} “Wholesale,” a term of art in the electric utility field, means sale other than “retail” sales of electricity to end consumers, which have historically been regulated by the states, as the FPA prohibits federal regulation over retail sales and facilities used for the generation and local distribution of electricity.^{10/} Electric power transmission and wholesale power transactions are FERC jurisdictional under the FPA. Likewise, in the absence of a FERC rule that would address the carbon content of imports to California (a fair assumption); it is important that California structure GHG compliance responsibility so that the regulation is not a restriction on transmission or on wholesale transactions *per se*. This way the sale is state-jurisdictional.

To the extent that the California first-seller is structured to regulate unbundled retail transmission access, the regulation exceeds the scope of its jurisdiction, which is limited under state law, and in addition would encroached upon matters that are exclusively regulated by the FERC.

In FERC Order 888, 61 Fed Reg 21540 (May 10, 1996), the FERC: (1) concluded that it has exclusive jurisdiction over the rates, terms and conditions of unbundled retail

^{9/} 16 U.S.C. § 824(a) (2000).

^{10/} *Id.* § 824(b)(1).

transmission by electric utilities in interstate commerce; and (2) set forth a seven-factor test to separate an electric utility's transmission facilities from its local distribution facilities. The FERC reaffirmed and clarified its conclusion and test in FERC Order 888-A, 62 Fed Reg 12274 (March 14, 1997). For example, in Order 888-A, the FERC stated:

“[T]his Commission has exclusive jurisdiction over the rates, terms and conditions of unbundled retail transmission by public utilities in interstate commerce . . .

“The fact that states historically regulated most retail transmission service as part of a bundled power sale is not the result of a legal requirement; it is the practical result of the way electricity has historically been bought and sold.

“We find compelling that section 201 of the [Federal Power Act], on its face, gives the Commission jurisdiction over transmission in interstate commerce without qualification. . . .”^{11/}

An attempt by California to encroachment into the FERC's exclusive jurisdiction must yield under the Supremacy Clause. The FERC's jurisdiction must remain exclusive, since “there can be no divided authority over interstate commerce. . . .”

Mississippi Power & Light Co v Mississippi ex rel Moore, 487 US 354, 377; 101 L Ed 2d 322; 108 S Ct 2428 (1988).

B. Traditional or Nontraditional Characterization

In *Garamendi*, Justice Souter explained that “it would be reasonable to consider the strength of the state interest, judged by standards of traditional practice, when deciding how serious a conflict must be shown before declaring state law preempted.”^{12/}

Unsurprisingly, state GHG regulations may be framed in ways that make them seen either traditional or nontraditional, depending on how one views their purpose and at what level of abstraction one characterizes them. States have regulated air pollution since before the Clean Air Act (“CCA”), and now, under the cooperative federalist

^{11/} 62 Fed Reg at 12369.

^{12/} *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 420 (2003).

structure of the CAA, they enjoy substantial latitude to devise their own policies and to exceed minimum federal standards.^{13/} California's practice of regulating vehicle emissions predates the CAA and has been grandfathered into it. Similarly, states have historically exercised significant, though not exclusive, regulatory authority over electric generation. So, when characterized as a species of air pollution or electric power regulation, state GHG regulations fall within traditional state responsibilities. In response, industry market participants may argue that these cooperative federalism relationships reflect a tradition in which states may address unique local problems, not one in which states address problems that are unavoidably global in scope. Both sets of arguments are viable under the first-seller approach. Sadly, it is hard to imagine judges deciding whether state GHG regulation falls within a traditional area of state responsibility without reference to their own views on climate change policy and their level of sympathy with the state's approach. If a reviewing court were to find that, in implementing the first-seller approach, California had acted outside its traditional area of responsibility, the state could still have a defense: to claim that state GHG regulations are valid absent a controlling enacted law or clear executive statement to the contrary. FERC preemption must have some gatekeeping test, some way of sorting out which state policies related to federal jurisdiction and which do not. At this time, however, significant legal ambiguity exists over whether the first-seller approach is preempted because neither FERC nor the courts have spoken to the issue of whether a state may regulate an extraterritorial air pollution or electric power generation process via a contract nexus.

44. For purposes of your legal analysis of the previous question, would your opinion

^{13/}42 U.S.C. § 7416 (2000).

differ if the deliverer/first-seller were the reporting entity only and not also the point of regulation? Why or why not?

The legal review of a state regulation which asserts jurisdiction over an entity to require reporting would be reviewed for preemption purposes under the same analysis.

45. Could the deliverer/first-seller approach be designed or implemented in a way that would avoid or lessen problems under the Federal Power Act? If so, how?

The first-seller approach should be designed or implemented in a way that will not interfere with the sale of electric current under an authorized wheeling market, a transaction wholly within interstate commerce, notwithstanding the fact that the current is delivered at the state line. Further, because wheel-through transactions are neither produced nor consumed in California, the GHG associated with wheel-through power falls outside AB 32 GHG regulation.

46. Compare Federal Power Act issues under a deliverer/first-seller approach and a load-based approach.

The issues would be the same for purposes of Federal Power Act preemption analysis to the extent both approaches similarly seek to regulate imported wholesale power.

47. If you conclude that Federal Power Act preemption would be a problem, could FERC action (e.g., approval of a CAISO tariff rule) ameliorate this problem? If so, what specifically could FERC do? Could FERC ameliorate any Federal Power Act concerns related to publicly-owned utilities?

SDG&E and SoCalGas cannot conclude based on the limited scope of information provided regarding the first-seller approach in the MAC Report whether the Federal Power Act preemption would be a problem.

Dormant Commerce Clause

48. Does the deliverer/first-seller approach raise problems under the dormant Commerce Clause?

While there are no inherent Commerce Clause problems raised by the upstream point of regulation under a first-seller approach, if the burden on interstate commerce is found to outweigh any putative local benefits, or other reasonable, non-discriminatory alternatives are available, the regulation is likely to be found to be an unconstitutional exercise of state power in violation of the Commerce Clause. According to Justice Blackmun, “it is difficult to conceive of a more basic element of interstate commerce than electric energy, a product used in virtually every home and every commercial or manufacturing facility.” *Fed. Energy Regulatory Comm’n v. Mississippi*, 486 U.S. 742, 757 (1982). The transmission of electric current from one state to another, like that of gas, is interstate commerce, *Coal & Coke Co. v. Pub. Serv. Comm.*, 84 W. Va. 662, 669, 100 S. E. 557, 7 A. L. R. 108, and its essential character is not affected by a passing of custody and title at the state boundary that does not arrest the continuous transmission to the intended destination. *People’s Gas Co. v. Pub. Serv. Comm.*, 270 U.S. 550, 554, 46 S. Ct. 371.

A. The Genesis and Development of the Dormant Commerce Clause

A basic understanding of Commerce Clause principles is necessary to appreciate the constitutional issues raised by California’s “First Seller” approach to capping Greenhouse emissions associated with electricity. Article One, Section Eight of the United States Constitution states that “Congress shall have the power ... to regulate Commerce among the several States.”

The Constitution gives Congress the power to “regulate Commerce with foreign Nations, and among the several States.”^{14/} This power is typically referred to as

^{14/} U.S. Const. art. I, §8, cl. 3.

Congress' Commerce Clause power. Underlying this grant of power was a desire to avoid the economic "Balkanization" of the national economy by the states and to recognize "the importance of the federal government being able to act in areas that affected the economic well being of the nation as a whole."^{15/} In *Gibbons v. Ogden*,^{16/} the United States Supreme Court first articulated the principle that the Commerce Clause contained a dormant aspect which limits the states' power to legislate.^{17/} Even without Congressional action, this dormant aspect implies that states may not discriminate against or unduly burden interstate commerce.^{18/} Despite this implied limitation, the Court has recognized on many occasions that the states still retained many of their traditional police powers.^{19/} Thus, where Congress has not regulated commerce, "courts are left to balance the need for laws that allow commerce to freely occur between the states against the power of the states to regulate matters that affect the health, safety, and security of their citizens."^{20/}

In the years since *Gibbons*, the Dormant Commerce Clause jurisprudence has gone through several iterations as the Court has attempted to articulate what differentiates permitted and prohibited state regulation.^{21/} The Court's current jurisprudence has

^{15/} Michael W. Loudenslager, *Allowing Another Policeman on the Information Superhighway: State Interests and Federalism on the Internet in the Face of the Dormant Commerce Clause*, 17 *BYU J. Pub. L.* 191, 208-09 (2003) (citing *S. Cent. Timber Dev. v. Wunnicke*, 467 U.S. 82, 92 (1984); *Quill Corp. v. N. Dakota*, 504 U.S. 298, 312 (1992)).

^{16/} 22 U.S. 1 (1824).

^{17/} See, e.g., Michelle Armond, Note, *Regulating Conduct on the Internet: State Internet Regulation and the Dormant Commerce Clause*, 17 *Berkeley Tech. L.J.* 379, 380 (2003).

^{18/} Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 *Yale L.J.* 785, 788 (2001).

^{19/} Loudenslager, *supra* note 11, at 209 (citing *Maine v. Taylor*, 477 U.S. 131, 151 (1986); *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 531-32 (1949); *Henderson v. Mayor of N.Y.*, 92 U.S. 259, 271 (1875); *New York v. Miln*, 36 U.S. (10 Pet.) 102, 133 (1837)).

^{20/} *Id.* at 209-10 (citing *Healy v. Beer Inst.*, 491 U.S. 324, 335-37 (1989); *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 533 (1949); *S. Pac. Co. v. Sullivan*, 325 U.S. 761, 768-69 (1945)).

^{21/} Peter C. Felmly, Comment, *Beyond the Reach of States: The Dormant Commerce Clause, Extraterritorial State Regulation, and the Concerns of Federalism*, 55 *Me. L. Rev.* 467, 472-75 (2003) (explaining the "local-national scheme" and the "direct-indirect analysis" once used by the Court).

distinguished between those state laws that plainly discriminate against interstate commerce and those state laws that, while neutral, impose a burden upon interstate commerce.^{22/} Laws that discriminate against “out-of-staters” and which represent forms of economic protectionism are at the core of prohibited state regulation, commanding the strictest level of scrutiny.^{23/}

B. Facially Neutral Laws Under the Dormant Commerce Clause

State laws that do not discriminate against nonresidents may still violate the Dormant Commerce Clause. Three lines of analysis are presently used by the courts to evaluate the constitutionality of these statutes. The Court’s current test, first articulated in *Pike v. Bruce Church, Inc.*, balances the local benefits provided by the law against the burdens it imposes upon interstate commerce.^{24/}

Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.^{25/}

However, Dormant Commerce Clause analysis of a state law does not end with the *Pike* test. The Court has also “invalidate[d] state legislation on the ground that it

^{22/} See, e.g., *Brown-Forman Distillers Corp. v. N.Y. State Liquor Authority*, 476 U.S. 573, 579 (1986).

^{23/} *Goldsmith & Sykes*, *supra* note 14, at 788 (citing *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 87 (1987)).

^{24/} *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

^{25/} *Felmly*, *supra* note 17, at 482 (quoting *Pike*, 397 U.S. at 142) (internal citations omitted).

regulates extraterritorially.”^{26/} In *Healy v. The Beer Inst.*, the Court articulated a three-prong analysis to determine whether a state law regulates outside the state’s borders: First, the ‘Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State’s borders, whether or not the commerce has effects within the State’ Second, a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State’s authority and is invalid regardless of whether the statute’s extraterritorial reach was intended by the legislature. . . . Third, the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other states and what effect would arise if not one, but many or every, State adopted similar legislation.^{27/}

Finally, many of the Court’s Dormant Commerce Clause decisions have invalidated state statutes that potentially subject an area of interstate commerce to inconsistent state regulation.^{28/} Some courts have cited these cases in decisions concerning state regulation of the Internet, asserting that “certain areas of regulation are so integral to interstate commerce that they require the uniformity throughout the country that only federal legislation can provide.”^{29/} But while the Supreme Court has invalidated some state statutes concerning highways and railways based upon inconsistent state regulation, it has done so while showing deference to the important

^{26/} See, e.g., *Healy v. The Beer Inst.*, 491 U.S. 324, 335-40 (1989) (discussing the Supreme Court’s prior extraterritoriality jurisprudence).

^{27/} *Healy*, 491 U.S. at 336-37.

^{28/} See, e.g., *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 526-27, 529-530 (1959) (striking down a state highway regulation); *S. Pac. Co. v. Sullivan*, 325 U.S. 761, 779-82 (1945) (striking down a state railroad regulation).

^{29/} Loudenslager, *supra* note 11, at 219 (citing *Am. Civil Liberties Union v. Johnson*, 194 F.3d 1149 (10th

safety function of such statutes, noting that “[t]hese safety measures carry a strong presumption of validity when challenged in court.”^{30/} The Court has emphasized the “peculiarly local nature of [the] subject of safety, and ha[s] upheld state statutes applicable alike to interstate and intrastate commerce, despite the fact that they may have an impact on interstate commerce.”^{31/}

Of the three lines of analysis described above, the *Pike* balancing test is the most clearly articulated by the Court. Some commentators believe that extraterritorial effect and inconsistent state legislation are merely facets of the *Pike* balancing test, where the burdens upon interstate commerce are still weighed against the local benefits provided.^{32/} Others have treated extraterritorial effect and inconsistent state legislation as separate and distinct tests from *Pike* balancing.^{33/}

C. State Interest in Regulating GHG Emissions

On a simple level, the state interest in regulating emissions is strong. If California believes that the accumulation of GHGs in the atmosphere creates a risk of harmful consequences – which is not a completely unreasonable belief- then the state certainly has an interest in regulating GHGs. Regulating industries then have two counterarguments at their disposal. First, they may argue that states have only a weak or symbolic interest because the global scale of the problem dictates that individual state regulations have negligible effects on the atmospheric GHG concentrations. States may respond to this argument first by appealing to the surprisingly large scale of their

Cir. 1999); *Am. Library Ass’n v. Pataki*, 969 F. Supp. 160, 163 (S.D.N.Y. 1997)).

^{30/} *Bibb*, 359 U.S. at 524, 530. *See also* *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 443-44 (1978).

^{31/} *Bibb*, 359 U.S. at 523.

^{32/} *See, e.g., Armond, supra* note 13, at 381.

^{33/} *See, e.g., Loudenslager, supra* note 11, at 215 (stating that extraterritorial effect is a per se Commerce Clause violation).

projected regulatory impact. For example, the Western Regional Climate Action Initiative and the RGGI program involve the participation of ten and seven states respectively and thus may have nontrivial global impacts. But even if CARB regulations have only small impacts in terms of global emissions, California may claim an interest in demonstrating the economic or technological feasibility of the regulatory approaches chosen. If, for example, the first-seller approach succeeds, it could serve as a model for a national cap and trade program. Or, the first-seller approach may reveal lower compliance cost than are currently projected by industry, creating a political opportunity for national regulations. In sum, if constitutional law recognizes an interest in preserving states laboratories of experimentation, then surely the states themselves have an interest in fulfilling that experimental function when doing so may further the cause of favorable national policy.

Second, regulated market participants may argue that the state interest in regulating GHGs is undifferentiated from the national interest and thus weak as a state interest per se. The Supreme Courts April 2, 2007, decision in *Massachusetts v. EPA* (No. 05-1120) made clear that states may be ill suited to regulate GHG emissions. More specifically, the majority opinion advises that “Massachusetts cannot invade Rhode Island to force reductions in GHG emissions, it cannot negotiate a treaty with India or China, and in some circumstances, the exercise of its police powers to reduce in-state... emissions might well be preempted.” States may respond by first arguing that, under plausible scientific models, climate change will cause certain regions of the country to suffer disproportionately. For example, rising sea levels may harm coastal states, while rising concentrations of carbon dioxide may actually help agricultural states. In addition to geographic differentiation, people in different states may possess different preferences

relating to the tradeoff between regulatory cost and the environmental risks. A state's interest may differ from the federal interest insofar as it reflects a substantially higher willingness to pay for mitigating the risk of climate change.

While legal ambiguity exists over state regulation of GHG, both the load-based and first-seller approaches share similar challenges because no authority has spoken to the issue of whether a state may regulate a foreign emission process. To the extent the first-seller approach may be defined as regulating the sale transaction as opposed to the extraterritorial generation process it may be able to avoid challenges under the Dormant Commerce Clause.

49. Could the deliverer/first-seller approach be designed or implemented in a way that would avoid or lessen problems under the dormant Commerce Clause? If so, how?

There are no inherent Commerce Clause problems raised by virtue of the first-seller approach. Whether the regulatory design or implementation under AB 32 is done under a load-based or a first-seller/buyer approach the key issue to avoid a challenge is to narrowly tailor the approach so as to avoid any conduct that may constitute extraterritorial regulation.

50. Are issues under the dormant Commerce Clause more or less serious under a deliverer/first-seller approach compared with a load-based approach? Explain.

The issues under the dormant Commerce Clause are the same under a load-based approach or first-seller approach.

51. The Market Advisory Committee report suggests that the value of GHG emission allowances “can be used to fund innovative emission reduction technologies and to focus pollution-reduction efforts in low-income and minority communities” or “can be utilized to provide transition assistance for workers and industries subject to strong market pressures from competitors operating in jurisdictions that lack similar caps on greenhouse gas emissions” (Market Advisory Committee report, at iv - v) or “should be directed to investments in end-use efficiency improvements” (*Id.*, at 54). Would these uses raise problems under the

dormant Commerce Clause? Would these problems be more or less serious under a deliverer/first-seller approach compared with a load-based approach?

MAC's recommendation to use a portion of allowance value to provide transition assistance aimed at mitigating the impact of a pollution cap may potentially be viewed as putting out-of-state power suppliers at a competitive disadvantage since the independent generators are competing with LSE generation. Thus, a state statute that simultaneously attempts to control transactions that take place wholly outside the state's borders would have sweeping extraterritorial effects that tend to violate the Commerce Clause. Similarly, no California statute may project its legislation into other states by insisting that producers or consumers in other States surrender whatever competitive advantages they may possess. The same analysis would apply under a load-based or first-seller approach.

Authority to Auction

52. Does ARB have the authority, under AB 32 or any other statute, to auction allowances to emit greenhouse gases? Explain.

AB 32 contains no specific language concerning auction of allowances and there is nothing in the legislative history that defines allowances as a compliance option. However, AB 32 generally authorizes ARB to utilize "market-based compliance mechanisms" to achieve GHG compliance.^{34/}

Other Legal Issues

53. Are there any other legal issues that the Public Utilities Commission and the Energy Commission should consider in deciding whether to investigate the deliverer/first-seller approach further? Explain.

SDG&E and SoCalGas have no other legal issues at this time.

^{34/} Health and Safety Code section 38505(f).

Respectfully submitted this 6th day of August, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of **RESPONSE OF SAN DIEGO GAS & ELECTRIC COMPANY (U 902 E) AND SOUTHERN CALIFORNIA GAS COMPANY (U 904 G) ON ADMINISTRATIVE LAW JUDGE'S RULING REQUESTING COMMENTS AND LEGAL BRIEFS ON MARKET ADVISORY COMMITTEE REPORT** has been electronically mailed to each party of record on the service list in R.06-04-009. Any party on the service list who has not provided an electronic mail address was served by placing copies in properly addressed and sealed envelopes and depositing such envelopes in the United States Mail with first-class postage prepaid.

Copies were also sent via Federal Express to Commissioner Michael R. Peevey and the Assigned Administrative Law Judges Charlotte TerKeurst, Jonathan Lakritz, and Meg Gottstein.

Executed this 6th day of August 2007 at San Diego, California

/s/ Jodi Ostrander
Jodi Ostrander

CALIFORNIA PUBLIC UTILITIES COMMISSION

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